

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No 979 of 1980

For Approval and Signature:

Hon'ble MR.JUSTICE M.R.CALLA

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1. Whether Reporters of Local Papers may be allowed : NO  
to see the judgements?

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy : NO  
of the judgement?

4. Whether this case involves a substantial question : NO  
of law as to the interpretation of the Constitution  
of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge? : NO

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MADHUKAR KACHARABHAI PILWAIKAR

Versus

PATEL BABUBHAI LALLUDAS

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Appearance:

Mr.K.D.Shah for  
MR KG VAKHARIA for appellants  
MR PK JANI for Respondent No. 1

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CORAM : MR.JUSTICE M.R.CALLA

Date of decision: 01/12/2000

ORAL JUDGEMENT

1. This is Defendants' First Appeal against the  
judgment and decree dated 21.1.1980 passed by the City  
Civil Court No.13 at Ahmedabad in Civil Suit No.2903/73  
whereby the trial court has decreed the suit against the  
defendants Nos.1 and 2, who are appellants in this

Appeal.

2. The plaintiff residing at Unjha had been carrying on the business in the name and style of the Firm " M/s. Narayan Lalludas Patel". He came into contact with the Field Officer of the L.I.C. of India, namely, Shri M.D.Pandya. The Plaintiff was desirous of purchasing a house at Ahmedabad. Said Shri Pandya came to the shop of the Plaintiff at Unjha in the first week of January, 1969 alongwith present Defendants Nos.1 and 2 i.e. the present appellants and the defendant No.1 at that time told the plaintiff that he intended to sell his house situated in Avnika Park Co-operative Housing Society, Khanpur, Ahmedabad. Defendants Nos.1 and 2 were staying in this house at that time and that the house was in the name of defendant No.1 in the Records of the Society. On 18.1.1969 defendants Nos.1 and 2 came to the shop of the plaintiff at Unjha where Shri Pandya was also called. One of the owners of the shop, namely, Shri Ranchhodbhai Patel was also sitting in the shop of the plaintiff firm. At that time defendant No.1 agreed to mortgage the suit house for Rs.17,000/-- and after being given the amount of Rs.17,000/-- he put his signature in the "Sahi Book". It was decided at that time that the mortgage deed will be executed at Ahmedabad. The plaintiff and said Shri Pandya came down to Ahmedabad and the defendant No.1 executed the registered Mortgage Deed in favour of the plaintiff. On 9.4.1969 the defendants Nos.1 and 2 and Shri Pandya came to the shop of plaintiff at Unjha and defendants Nos.1 and 2, in presence of plaintiff's younger brother Shri Naranbhai stated that the suit property, which was mortgaged for Rs.17,000/-, was to be sold away by them. After some bargaining the price of the suit house was fixed at Rs.35,000/-. The amount of Rs.17,000/-, which was taken by the defendant No.1 at the time of mortgaging the suit property, was to be adjusted towards the price. It is also the case of the plaintiff that over and above this amount, it was decided that a further sum of Rs.10,000/-- would be paid on that day and that the remaining amount of Rs.8000/-- was to be paid at the time of handing over the possession of the suit house to the plaintiff and at the time of execution of the sale deed. This amount of Rs.10,000/-- was given to the defendants Nos.1 and 2 on that date and in respect of that amount, defendant No.1 had executed a promissory note. Thereafter, on 11.4.1969, the plaintiff and Shri Pandya came to Ahmedabad and sale agreement (Banakhat) was executed on a stamp paper in respect of the suit property. Out of a sum of Rs.27,000/-- given to the defendants, Rs.4000/-- were to be treated as earnest money and remaining amount of Rs.23,000/-- was to be paid

as a part payment towards the consideration of the suit property. It was agreed under the said Banakhat (Agreement to sell) by the defendant No.1 that he will transfer the suit house and hand over the vacant possession thereof to the plaintiff within a period of six months. Even though the plaintiff was prepared to give the remaining amount of rs.8,000/-- as per the Banakhat, the defendant No.1 did not get the suit house transferred in the name of plaintiff nor did he execute the sale deed in respect thereof. Plaintiff, therefore, gave notice dated 2.11.1969 through his Advocate to the defendant No.1 for acting as per the Banakhat executed by him. The defendant No.1 gave his reply dated 19.11.1969 to the said notice raising evasive contentions. The plaintiff gave a counter reply on 22.12.1969. At the time when the mortgage deed was executed and also at the time when the Banakhat was executed by defendant No.1, the defendants Nos.1 and 2, in collusion with each other, transferred the suit house to defendant No.2. The transfer in the name of defendant No.2 from that of defendant No.1 was without any consideration. Defendant No.2 was aware of the mortgage deed and Banakhat executed by defendant No.1. The plaintiff, therefore, filed a complaint in the Court of J.M.F.C., Siddhpur, against defendants Nos.1 and 2 for the offence punishable under Sec.420 of the I.P.C. In the Civil Suit the plaintiff prayed for a decree for special performance of the sale agreement and in the alternative, for damages of Rs.35,000/-- against the defendants. The description of the suit property was given in para 7 of the plaint as House No.28 admeasuring about 70 sq.yds. situated at Avnika Park Co-opertive Housing Society, Khanpur Ward No.II, City Survey No.4229/28, Ahmedabad. The plaintiff was ready and willing to pay the remaining amount of consideration i.e. Rs.8000/-. At a subsequent stage, the plaintiff has stated in Para 9A of the plaint that defendants No.1 and 2 have let out the suit property and the first floor, which had been constructed thereon to defendant Nos.3(1) to (5). However, no relief is claimed against the defendants Nos.3(1) to (5).

3. Defendants Nos.1 and 2 contested the suit vide written statement Exh.16 and denied the case of the plaintiff as stated in para 3 of the impugned Judgment. Defendant Nos. 3 (1), 3 (2), 3(3) and 3(4) have filed a written statement Exh.48 contending that they are not necessary parties to the Suit. It was stated in terms of Para 2 of the written statement Exh.48 that they are not concerned with any of the allegations made in the plaint except those in Para 9A. In para 3 while dealing with the allegations made in Para 9A of the plaint, they

denied that the suit property or the first floor thereof were let out to defendants Nos.3(1) to 3(3). It was also denied that these defendants are in possession of these premises as alleged and it was stated that they are not necessary parties to the Suit. It was also contended in the written statement that defendant No.1 was not the owner of the suit property at the time of his executing the Banakhat. It was also denied that defendant No.1 had been managing the suit property. It was also contended that first and second floors of the suit property had been constructed by defendant No.2 after filing of the suit. It was also denied that defendants Nos.3(1) to 3(5) had let out any part of the suit property.

4. On the pleadings of the parties, the trial court framed the following issues and recorded the findings as under mentioned against each of the issues:-

ISSUES : (1) Is it proved that:

- (a) the receipt executed by defendant No.1 in favour of plaintiff in plaintiff's Sahi Book on 18.1.1969; or
- (b) the mortgage deed for Rs.17000/- executed by defendant No.1 in favour of plaintiff; or
- (c) Promissory note for Rs.10000/- executed by defendant No.1 in favour of plaintiff on 9.4.1969; or
- (d) the Banakhat dt.11.4.1969 executed by defendant No.1 in favour of the plaintiff with respect to property described in the plaint are:-
  - (i) without consideration; or
  - (ii) nominal and/or
  - (iii) fraudulently obtained by plaintiff in the background and circumstances particularised by defendants at para-16 of the Written Statement?  
-- In the negative.

(1 A) Do the defendants prove that the plaintiff is not entitled to the specific performance of the contract under the Banakhat dt.11.4.1969 on the grounds alleged in para 8, A,B & C of the Written Statement?

-- In the negative

2 (a) Is it proved that plaintiff represented to defendants that plaintiff paid Rs.15,600/- in all to various creditors of defendant no.1 and that only if defendant no.1 paid that sum along with interest, to the plaintiff, the plaintiff would return the aforesaid mortgage deed and Banakhat to the defendant No.1?

(b) Is it proved that defendant no.1 being unable to pay the above said amount of Rs.15,600/- to the plaintiff at a time the plaintiff made out an account thereof and claimed including interest, a total sum of Rs.21000/-?

(c) If yes, is it also proved that Mr. Pandya paid up the said sum of Rs.21000/- to the plaintiff?  
-- In the negative.

3 (a) Is it proved that defendant no.1 committed breach of Banakhat (agreement) dated 11.4.1969; if yes, is plaintiff entitled to specific performance thereof?

--- In the affirmative.

(b) If no, is it proved that plaintiff suffered damages on account of the aforesaid breach if yes, what is the extent of such damages?

-- Does not survive for consideration.

4. Has this court no jurisdiction to try the Suit?

-- This Court has jurisdiction to entertain the Suit.

5. What order?

-- As per the final order.

5. It is very clearly brought out from the evidence, as discussed by the trial court, that the defendants had taken a sum of Rs.27,000/- from the Plaintiff. The property in question was to be sold out for a sum of Rs.35,000/- as per the Agreement for which period of six months was fixed. The plaintiff was always ready and willing to pay the remaining amount of Rs.8,000/- but the defendants did not carry out the agreement. This Court finds that once the plaintiff's case is established with regard to the payment of Rs.27,000/- to the defendants and further the factum of the execution of the Banakhat for the sale of the property in question for a sum of Rs.35,000/- is proved, it was certainly obligatory on the part of the defendants to execute the sale deed

and hand over the property in question to the plaintiff. The Receipt Exh.92 dated 18.1.1969, written and signed by defendant No.1 in the "Sahi Book" of the Plaintiff's Firm is not in dispute. It is also not in dispute that the mortgage deed dated 27.1.1969 had been executed by defendant No.1 and that the signatures, which were initially given separate Exhibit (Exh.75) on a promissory note Exh.116 dated 9.4.1969, were the signatures of defendant No.1. However, plea was taken that these documents were not to be acted upon and they were executed by defendant No.1 only to re-assure the brother of plaintiff Shri Naranbhai in respect of the plaintiff having agreed to give payment to the creditors of defendant No.1 and his father and further that the documents Exh.74, 76 and 92 were also not to be acted upon. That these documents had been signed without any consideration and were fraudulently obtained by the plaintiff. This plea was contested on behalf of the plaintiff by saying that defendant No.1 was an astute businessman, who had acted as an organiser of housing Societies and such a person would in no circumstance execute the documents on the assurance that they will not be acted upon and that he would sign these documents without any consideration. The defendants case that the plaintiff had undertaken to pay the creditors of defendants at Ahmedabad was an after thought and could not be believed. Therefore, the plaintiff was entitled to specific performance of the Banakhat dated 11.4.1969 against defendants No.1 and 2.

6. In the opinion of this court, the defendant No.1 had in fact received the sum of Rs.17,000/- and Rs.10,000/- (Rs.27,000/- in all) and it cannot be believed that the Banakhat Exh.76 dated 11.4.1969 was without any consideration. It is also established that the plea, which has been taken by the defendants, was an afterthought. No evidence has been led to show that the documents had been fraudulently obtained by the plaintiff, except the bald plea advanced on behalf of the defendants before the Court. It is, therefore, found that while the plaintiff was always ready and willing to discharge his obligations for the purpose of the contract, the defendants did not perform the part of their obligation and, therefore, on consideration of the evidence, it is found that the trial court has recorded the findings based on the evidence and for good and valid reasons. The trial court has rightly held that the plaintiff was entitled to a decree of specific performance of the Sale Agreement dated 11.4.1969 against the defendants Nos.1 and 2 and that the decree could also be passed against defendant No.2 in view of the

provisions of Sec.19(b) of the Specific Relief Act because the property was subsequently transferred in the name of defendant No.2 in the records of the Society. The defendant No.2 had not even cared to enter into the witness box to put up any case that she was transferee for the value which had been paid in good faith and without notice of the original contract. No such plea was taken even in the written statement. All that was said was that the transfer was prior to the date of Banakhat whereas it is established on record by evidence that the transfer was in fact subsequent to Banakhat Exh.76 dated 11.4.1969.

7. On 10.11.2000 when the matter came up before this Court, the matter was heard for some time and during the course of arguments, learned counsel for the appellants Mr.K.D.Shah sought time to take instructions from his client to settle the mater. The case was, therefore, adjourned to 24.11.2000. On 24.11.2000 it was given out that the appellant wanted to settle the matter but he had undergone surgery and, therefore, some more time be given and, therefore, the matter was posted for today, at the request of learned counsel for the appellants. Today it has been given out by Mr. K.D.Shah on behalf of the appellants that it is not possible for the appellants to settle the matter. Now it is a strange situation in which the appellants are neither prepared to return the money, which they had taken from the respondent-plaintiff with interest as was agreed in the Promissory Note nor they are prepared to part with the property in question. Mr. P.K.Jani had made a statement on behalf of the respondent - Plaintiff that in case the appellants are ready and willing to pay the amount, which had already been received by them with interest at the rate at which it was agreed, the amount comes to nearly Rs.23 lacs cumulatively. He further stated that he may even persuade his client i.e. respondent - plaintiff to settle the matter if the appellants are prepared to pay a sum of Rs.11 lacs, but it is given out by Mr. K.D.Shah that the appellants are not even ready for that. Hence it has not been possible to arrive at any settlement of this long pending dispute since 1969.

8. This Court finds that the findings recorded by the trial court on each of the issues are based on evidence and have been arrived at for good and valid reasons. The appellants failed to discharge their obligations whereas the respondent - plaintiff was always ready and willing to discharge his obligation and, therefore, the impugned judgment does not warrant any interference. The decree for specific performance of the

contract has been rightly passed by the trial court. This Court does not find any substance in this Appeal. The same is hereby dismissed with costs.

9. Since the main Appeal itself has been dismissed with costs, there is no question of continuing the stay order, which was initially granted on 17.9.80 and made absolute on 3.12.80 in Civil Application No.2233/80 and the same ceases to be operative forthwith.

This dispute is pending since 1969 and even before this Court, the appellants have already enjoyed the stay order for a period of about 20 years. In this background, no case is made out for continuing the stay order as was prayed for by Mr.K.D.Shah on behalf of the appellants. The prayer is declined.

(M.R.Calla,J)